Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, *et al.*,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND FIVE CATHOLIC PRISONERS, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

STEVEN FREDERICK MCDOWELL*
General Counsel

WALTER M. WEBER
Associate General Counsel

Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Attorneys for
Amici Curiae

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. RESPONDENT PRISONERS' CONSTITUTIONAL RIGHT TO THE FREE EXERCISE OF RELIGION PREVAILS OVER PETITIONER PRISON OFFICIALS' DENIAL OF THE RIGHT TO ATTEND FRIDAY SABBATH SERVICES 6

A. Infringements on Prisoners' Religious Rights are Subject to Strict Judicial Scrutiny 6

1. Prisoners fully retain the right to the free exercise of religion 7

a. Religious practice is not fundamentally inconsistent with incarceration 7

b. Analytical coherency requires full recognition of religious rights for prisoners ... 8

2. The Constitution forbids unnecessary restrictions on religious rights 9

B. No Government Interest Justifies the Denial of Respondent Prisoners' Right to Attend Friday Sabbath Services 10

1. No government interests other than preserving prison security and internal order are sufficiently compelling to override religious rights 10

a. Rehabilitation cannot justify the suppression of religious practice 11

b. Deterrence cannot justify the suppression of religious practice 12

c. Budgetary and administrative convenience cannot justify the suppression of religious practice 12

2. The prison officials have not justified the denial of the inmates' right to attend Friday Muslim religious services 13

a. The prison seeks to impose unnecessary restrictions 13

b. The prison seeks to restrict religion merely to further rehabilitation and administrative convenience 14

c. The prison seeks to modify inmates' religious obligations to conform with administrative desires 15

II. THE PRISON OFFICIALS MAY NOT COMPEL INMATES TO CHOOSE BETWEEN RELIGIOUS RIGHTS AND PROGRESS TOWARD FREEDOM FROM PRISON 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: Page

Bell v. Wolfish, 441 U.S. 520 (1979) 6, 10, 15

Cantwell v. Connecticut, 310 U.S. 296 (1940) 6

Card v. Dugger, No. 86-572-Civ-J-12 (M.D. Fla. filed Oct. 13, 1986).....2

Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) ...7, 8, 13

Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926).....16

Hudson v. Palmer, 468 U.S. 517 (1984) 6, 7, 8

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) 7, 9, 15

Larson v. Valente, 456 U.S. 228 (1982) 11

Mayola v. Board of Corrections, No. 7734-73-P (S.D. Ala. dismissed without prejudice, on plaintiff's motion, Nov. 20, 1973).....3

Mayola v. Governor, No. CV-86-1109-G (Ala. Circ. Ct., Montgomery County filed July 18, 1986).....3

Pell v. Procunier, 417 U.S. 817 (1974) 9, 10, 12, 15

Procunier v. Martinez, 416 U.S. 396 (1974).....10

Radziewicz v. Cunningham, No. 86-233-L (D.N.H. order entered granting relief in part, July 23, 1986) 4

Radziewicz v. Lawson, No. 86-284-L (D.N.H. magistrate report and recommendation that action proceed filed July 9, 1986) 4

Shabazz v. O'Lone, 595 F. Supp. 928 (D.N.J. 1984) 13

Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986) (en banc) 13

Sherbert v. Verner, 374 U.S. 398 (1963) 16

Thomas v. Review Board, 450 U.S. 707 (1981).....6, 9, 10, 15

Wisconsin v. Yoder, 406 U.S. 205 (1972).....6

Wolff v. McDonnell, 418 U.S. 539 (1974) 7, 8, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.....6, 8, 11

OTHER AUTHORITIES:

Comment, *The Religious Rights of the Incarcerated*, 125 U. Pa. L. Rev. 812 (1977).....7, 8, 9

Hutchison, *Analyzing the Religious Free Exercise Rights of Inmates: the Significance of* Bell, Jones, *and* Wolfish, 11 N.Y.U. Rev. L. & Soc. Change 413 (1982-83) 7

Note, *Free Exercise of Religion in Prison–the Right to Observe Dietary Laws*, 45 Ford. L. Rev. 92 (1976).....7

No. 85-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, *et al.*,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND FIVE CATHOLIC PRISONERS, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to safeguard Catholic beliefs, values, and practices, and to defend the religious freedom rights of Catholics and others.

Pope John Paul II has declared that religious freedom, as the cornerstone of civil rights, "upholds the justification, deeply rooted in each individual, of all other liberties." The League actively champions this principle in its publications, projects, and legal endeavors.

The battlefront in the ongoing struggle for religious freedom is extensive. Consequently it becomes all too easy to overlook the plight of those seeking to practice their faith while incarcerated. Yet it is precisely for this reason that prison officials—and courts—need to take religious rights for prisoners especially seriously. The pursuit of one's spiritual development may offer the prison inmate the single most important means of self-respect, consolation and rehabilitation. Religion in prison is a candle in darkness, and it is to keep that light aflame that the Catholic League submits this brief on its own behalf and on behalf of the following Catholic prisoners:*

1. James Armando Card, Sr. (Florida State Prison, Starke, Florida)—A death row inmate currently under a stay of execution, Mr. Card keenly feels the need for access to the sacraments of the Church so that he might reconcile himself to God before his death. When the governor signed a death warrant for Mr. Card in May of 1986, however, the prison denied Mr. Card any contact visits with a priest, thus effectively disabling Mr. Card from receiving Holy Communion or the Sacrament of Reconciliation (Confession). Mr. Card subsequently filed suit in an effort to regain his religious rights. *See Card v. Dugger,* No. 86-572-Civ-J-12 (M.D. Fla. filed Oct. 13, 1986).

2. Kent Edwin Evans (Brunswick Prison, Lawrenceville, Virginia)—Mr. Evans has repeatedly encountered a lack of sensitivity among prison officials to religious practice among prisoners. Recently, for example, a watch commander interrupted a weekly Mass for prisoners—at its

---

* The accounts of each inmate's situation derive from sources including prisoner correspondence, court pleadings (where available), and communications from knowledgeable third parties.

central and most important part—simply because the arrival of inclement weather made waiting thirty minutes for the regularly scheduled body count inconvenient. Mr. Evans is particularly concerned about "prison officials making decisions about matters of faith and morals and harassment of religious groups in the prison community."

3. Michael A. Mayola (Kilby Prison, Mt. Meigs, Alabama)—Mr. Mayola has spent the last twenty-four years in different facilities in the Alabama prison system. During that time he has frequently encountered a strong prejudice against Catholic belief and practice among state officials and employees. *See, e.g.,* papers filed in *Mayola v. Board of Corrections,* No. 7734-73-P (S.D. Ala. dismissed without prejudice, on plaintiff's motion, Nov. 20, 1973). At present, Catholic inmates in Alabama facilities have only uncertain access to priests (and thus to the sacraments). Mass is only scheduled twice per month, on Saturday mornings, despite the Catholic obligation to attend Mass each Sunday (or Saturday evening). Moreover, priests have permission to enter only the prison chapel, except where prison staff arbitrarily make exceptions in their personal discretion. Consequently, dying prisoners confined to prison medical facilities, and other prisoners in need of spiritual ministry outside the chapel, depend entirely upon the good will of prison staff for their right to see a priest. (State chaplains, however, all of whom are Protestant, have an official status which assures them regular access to prisoners). Mr. Mayola currently seeks judicial relief, requesting official access rights for priests who now have access conditioned solely upon the pleasure of prison staff. *See Mayola v. Governor,* No. CV-86-1109-G (Ala. Circ. Ct., Montgomery County filed July 18, 1986).

4. Charles H. Radziewicz (New Hampshire State Prison, Concord, New Hampshire)—Mr. Radziewicz actively and enthusiastically pursues his religious development, studying theology by mail, acquiring various religious writings, sponsoring missionary work, and engaging in various devotional practices. He has repeatedly encountered obstacles from the prison staff in these endeavors, however. The staff

periodically confiscate his religious materials (cards, scapulars, and so forth) and intercept or misplace incoming items or outgoing orders. To redress these difficulties Mr. Radziewicz at present maintains two separate civil actions. *See Radziewicz v. Cunningham,* No. 86-233-L (D.N.H. order entered granting relief in part, July 23, 1986); *Radziewicz v. Lawson,* No. 86-284-L (D.N.H. magistrate report and recommendation that action proceed filed July 9, 1986).

5. Douglas M. Thompson (McNeil Island Corrections Center, Steilacoom, Washington)—Mr. Thompson has compiled a list of incidents evidencing a general callousness by the prison administration to the religious concerns of Catholic inmates. In particular, for example, prison officials have attempted to cancel Mass and replace it with Protestant activities, have carelessly denied inmates access to scheduled Masses, have "rescheduled" for administrative convenience obligatory holydays of religious observance, have been strikingly uncooperative with the Catholic Chaplaincy (with respect to Catholic marriages, the provision of religious literature and devotional objects, and so forth), and have scheduled only meat dishes on days of Catholic abstinence from meat. Mr. Thompson and other Catholic inmates have therefore pursued grievance procedures, thus far without satisfaction.

The Catholic League has obtained written permission to file this brief from the attorneys of record for the parties to this case. These letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Prisoners, like all persons, have a right to religious freedom. The prison setting gives rise to certain compelling government interests which may justify restrictions on religious freedom. This does not mean, however, that the right itself diminishes, or that weaker government interests may

override religious rights. Nor does it mean that prison officials may impede religious practice when restrictions are not essential to further the relevant government interest.

Consequently, a prison may limit an inmate's religious liberty only if that limitation is necessary to further a compelling government interest.

While concerns with security and internal order constitute compelling government interests, concerns with rehabilitation, deterrence, and budgetary or administrative convenience do not suffice to justify burdens on religious practice.

Rehabilitation cannot justify restrictions on religious practice without wholly negating religious rights. Prisoners are literal captives to countless experimental rehabilitation programs, any of which might preclude a given religious observance. Moreover, prison officials may not teach inmates to forego a given religious practice simply because the prison administration regards it as silly, undesirable, or inconvenient.

Deterrence similarly cannot justify religious restrictions. Otherwise any denial or deprivation of rights would, because it made prison life less comfortable, serve as its own circular justification.

Budgetary and administrative convenience likewise could excuse virtually any neglect or denial of religious rights, and thus cannot serve as a valid justification for religious restrictions.

In the present case, the prison essentially relies upon the constitutionally inadequate government interests in rehabilitation and budgetary or administrative convenience. Moreover, the prison compels Muslim inmates to forego religious observance as a condition of achieving greater personal freedom.

The prison therefore has violated the constitutional right of respondents to exercise their religion freely.

ARGUMENT

I.

RESPONDENT PRISONERS' CONSTITUTIONAL RIGHT TO THE FREE EXERCISE OF RELIGION PREVAILS OVER PETITIONER PRISON OFFICIALS' DENIAL OF THE RIGHT TO ATTEND FRIDAY SABBATH SERVICES.

The First Amendment to the United States Constitution explicitly guarantees the right to the free exercise of religion.[1] This amendment protects individuals against governmental interference with religious liberty, whether by federal or state action. *Cantwell v. Connecticut,* 310 U.S. 296 (1940). All people, including inmates in prisons, possess this fundamental right. *Hudson v. Palmer,* 468 U.S. 517, 523 (1984); *Bell v. Wolfish,* 441 U.S. 520, 545 (1979).

In the case at bar, this right prevails over petitioners' efforts to suppress respondents' religious practices.

A. Infringements on Prisoners' Religious Rights are Subject to Strict Judicial Scrutiny.

In recognition of the constitutionally preferred status of the right to religious freedom, this Court has declared that government restrictions which burden the free exercise of religion violate the Constitution unless the restrictions represent the least restrictive means of furthering a compelling government interest. *Thomas v. Review Board,* 450 U.S. 707, 718 (1981). Only those interests "of the highest order" may justify burdens the state might impose on religious observance and practice. *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972).

The Constitution creates no special exception from this standard of strict scrutiny in cases involving prisoners' religious rights.

---

[1] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I.

1. Prisoners fully retain the right to the free exercise of religion.

Although occupants of a jail or prison are not at liberty to exercise the full panoply of their constitutional rights, *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125 (1977), prisoners do not forfeit all rights. "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell,* 418 U.S. 539, 555-56 (1974). Indeed, this Court has "insisted upon protection for the rights of prisoners except where recognition of those rights would be "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson v. Palmer,* 468 U.S. 517, 523 (1984).

Prisoners therefore retain the right to religious freedom. *Cruz v. Beto,* 405 U.S. 319 (1972) (per curiam).

a. Religious practice is not fundamentally inconsistent with incarceration.

Adherence to religion, and the practice of a faith, is not inherently incompatible with penal confinement. Indeed, the prison systems of this country originated with the notion that imprisonment would afford the inmate the opportunity to reconcile himself to God, through meditation and penance (hence the term "penitentiary"). *See* Comment, *The Religious Rights of the Incarcerated,* 125 U. Pa. L. Rev. 812, 819-20 (1977); Note, *Free Exercise of Religion in Prison—the Right to Observe Dietary Laws,* 45 Ford. L. Rev. 92, 98 (1976); Hutchison, *Analyzing the Religious Free Exercise Rights of Inmates: the Significance of* Bell, Jones, *and* Wolfish, 11 N.Y.U. Rev. L. & Soc. Change 413, 431 & n.127 (1982-83).[2]

---

[2] According to one commentator, it was only when "more than a century ago religion lost its centrality to the purpose of confinement [that] the inmate could no longer assume that the institution would respect his freedom to pursue his religious beliefs." Comment, *supra,* at 820. The constitutional right to the free exercise of religion provides the inmate with a defense, when necessary, against precisely this failure of prison administrations to respect religious practice.

Consequently, "[p]risoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments." *Wolff,* 418 U.S. at 556. While an inmate may not expect prison officials to grant his request for a pilgrimage to Mecca, he may fairly claim "reasonable opportunities," *Cruz v. Beto,* 405 U.S. at 322 n.2, to attend religious services (whether Sunday Mass or Friday Muslim services), obtain religious literature (whether a subscription to the Watchtower or a copy of the Bible), observe dietary laws (whether abstinence from pork or penitential fasting), and pursue other means of religious practice not "fundamentally inconsistent" with incarceration, *see Hudson,* 468 U.S. at 523.

These general constitutional guidelines reflect a recognition that "the values protected by the free exercise clause exist in the prison community to the same extent that they exist in the society outside of prison." Comment, *supra* p. 7, at 851. The right remains intact—only the circumstances shift.

b. Analytical coherency requires full recognition of religious rights for prisoners.

Prisoners do not lose their right to religious liberty merely because they may more frequently encounter constitutionally sufficient countervailing interests. Analytical coherency requires recognition of the distinction between the continuing efficacy of the right itself and the varying strength of opposing interests.

Thus, for example, a court might reject a prisoner's challenge to a restriction on his religious exercise on the grounds that strong governmental interests justify the regulation. This approach acknowledges both the right and the circumstances which necessitate restriction of that right. Alternatively, a court might rule that the restriction is valid because the right itself diminishes in prison. While the result of the case is the same, the latter approach does violence to the conceptual framework for analyzing rights. In effect, the court creates a new and diluted Free Exercise Clause for use only in prison settings.

This new "weak right," lacking full constitutional strength, will readily give way to strong contrary state interests; significantly, however, less important government concerns will also prevail. Such an ineffectual "right" is therefore no right; the court will have essentially constructed an impermissible "iron curtain" between the Constitution and the prisons. *See Wolff,* 418 U.S. at 555.

Proper analysis, therefore, involves simultaneous recognition of both the continuing vitality of free exercise rights in prison, and the existence of powerful government interests that may at times justify limiting religious liberty.[3] While the prison context gives rise to government interests sufficient to justify some restrictions on religious freedom, it does not provide a blanket justification elevating to constitutional sufficiency any and all asserted grounds for denying free exercise.

2. The Constitution forbids unnecessary restrictions on religious rights.

Respect for the religious rights of prisoners also requires that restrictions on religious rights be no greater than necessary to further the relevant government interests. Rights are meaningless if prison officials may abrogate their exercise without any justification for doing so.

Whether phrased as a requirement that restrictions be the "least restrictive means" of achieving the interest in question, *Thomas v. Review Board,* 450 U.S. at 718, that restrictions reach "no more broadly than they need," *Jones,* 433 U.S. at 133, or simply that restrictions not represent "exaggerated" responses to prison concerns, *Pell v. Procunier,* 417 U.S. 817, 827 (1974), the principle remains both obvious and essential to the preservation of religious rights. Prison officials may not subject religious exercise to unnecessary restrictions.

---

[3] *See* Comment, *supra* p. 7, at 852 ("a range of factual settings . . . [is] taken into account in the application of the test, rather than through the creation of a new test for each fact pattern that emerges").

B. No Government Interest Justifies the Denial of Respondent Prisoners' Right to Attend Friday Sabbath Services.

The constitutional requirement that regulations which burden religious liberty further a compelling government interest and extend no further than necessary, *Thomas,* 450 U.S. at 718, merely sets the framework for analysis of religious freedom claims. The actual application of this standard of review hinges largely on the identification and importance of particular government interests.

In the case at bar, no government interest justifies the denial of respondent prisoners' religious freedom.

1. No government interests other than preserving prison security and internal order are sufficiently compelling to override religious rights.

This Court has explicitly identified several legitimate government interests ordinarily present in the prison context. First and foremost are security (prevention of escape), *Procunier v. Martinez,* 416 U.S. 396, 412 (1974), and internal order and discipline, *id.* Secondary interests include rehabilitation, *id.; Pell v. Procunier,* 417 U.S. at 823, and deterrence, *Pell,* 417 U.S. at 822. Other interests exist—budgetary and administrative convenience, for example—but are not important enough to have received significant attention in this Court.

Of those various interests, only the compelling government interests in prison security and order may suffice to justify the suppression of religious practice.[4] Other govern-

[4] If prison sentences are to have meaning, the prevention of escape must be a compelling government interest. Moreover, for prisons to be able to function while maintaining the involuntary confinement of prisoners, the preservation of internal order and discipline must also rank as a paramount interest. *See Bell v. Wolfish,* 441 U.S. 520, 546 (1979) ("maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of [inmates]"). Hence, if some feature of a given religious practice conflicts with the goals of security or institutional functioning, prison administrators may accordingly limit that aspect of free exercise. Such limitation, however, may reach no further than necessary, *see supra* § I.A.2.

mental interests are not intrinsically compelling enough to override the free exercise of religion.

a. Rehabilitation cannot justify the suppression of religious practice.

Rehabilitation of inmates, for example, is a legitimate and worthy objective of prison administration. It cannot, however, suffice to justify prison restrictions on religious practice.

In the first place, rehabilitation seeks to prepare the prisoner for a return to society. Once back in society, the inmate will be at liberty to exercise his religion free of the constraints of prison life. Thus, as a logical matter, it makes no sense to impose barriers to religious practice prior to release in the name of preparation for release. The prison administration has no proper business teaching inmates to forego religious practice.

In the second place, restriction of free exercise as a rehabilitation technique smacks of reverse proselytization. Prison officials simply are not competent to decide what is a socially acceptable mode of religious practice. To the extent a prison tries to mold inmates into a particular religion (as when all the available chaplains belong to a specific denomination, or when Sabbath services are only permitted to be scheduled for a given faith), that action violates the Establishment Clause of the First Amendment. Similarly, to the extent a prison discourages a particular religion which prison officials consider antisocial or undesirable, the government impermissibly discriminates among denominations. *Larson v. Valente,* 456 U.S. 228 (1982).

Finally, to allow state officials to limit religious practice, even indirectly, in the name of rehabilitation, would be to authorize limitless suppression of religious practice. It takes little imagination to conceive of the multitude of programs and activities which would be "good for prisoners" but which would preclude religious observances. Not only would the potential for abuse exist, but religious liberty would also readily fall victim to mere administrative neglect. Prison adminis-

trators could schedule mandatory programs without the slightest heed for religious obligations.

b. Deterrence cannot justify the suppression of religious practice.

Deterrence, like rehabilitation, does not constitute a compelling government interest supporting restrictions on religious freedom.

Deterrence operates in two ways: first, by subjecting the prisoner to undesirable conditions (isolation from society and physical confinement), imprisonment discourages crime; second, by taking the criminal out of society, imprisonment directly forestalls additional crimes by that particular prisoner. *See generally Pell*, 417 U.S. at 822-23.

The first aspect of deterrence—the application of undesirable conditions—plainly cannot suffice to justify anything beyond the specific penalty to which the prisoner has been sentenced. Otherwise any additional hardship could be justified for its own sake, in the name of deterrence. Deprivation of any right would serve as its own circular justification.

The second aspect of deterrence—isolation from society as a crime prevention measure—has no relevance to religious practices confined to prison grounds and prison personnel. Practices involving free citizens (e.g., visits by ministers, excursions to local churches) may present concerns of security and internal order, but to the extent that they do, deterrence does not constitute a separate interest supporting prison restrictions.

c. Budgetary and administrative convenience cannot justify the suppression of religious practice.

Other, lesser government interests, such as budgetary concerns and administrative convenience, are wholly inadequate to justify the denial of religious liberty. Obviously, it will always cost more to accommodate religious practices than to ignore them; similarly, demonstrating sensitivity to religious concerns will be more administratively burdensome than wholly disregarding prisoners' religious needs. If such

minor concerns sufficed to override religious rights, prisoner free exercise would be entirely dependent upon the whim and pleasure of prison administrators.[5]

2. The prison officials have not justified the denial of the inmates' right to attend Friday Muslim religious services.

Whether the prison restriction at issue in a given case actually is necessary to further a sufficiently compelling government interest becomes a question tied to the particular facts of the case. In the case at bar, the prisoners have thoroughly demonstrated the constitutional inadequacy of the restrictions the prison officials imposed upon them.

Repetition of respondent prisoners' arguments is unnecessary here. Several points do merit special attention, however. In particular, the prison officials, like the district court, misconstrue in several respects the legal standard for evaluating prisoner religious rights cases.

a. The prison seeks to impose unnecessary restrictions.

The prison officials oppose the constitutional requirement that a restriction on religious freedom be necessary to serve the relevant state interest. These officials prefer the erroneous position of the district court—namely, that "a prison regulation may be overbroad yet still be valid," i.e., that is no objection that "the same goals could be achieved with less trampling upon [prisoners'] rights." *Shabazz v. O'Lone*, 595 F. Supp. 928, 934 (D.N.J. 1984). The court of appeals properly rejected this standard, noting that it would "deprive prisoners' free exercise rights of all content." *Shabazz v. O'Lone*, 782 F.2d 416, 420 (3d Cir. 1986) (en banc).

---

[5] This is not to say that prisoners may demand any religious accommodation, no matter how expensive or involved. The government has the obligation only to afford "reasonable opportunities" for prisoners to exercise their religious freedom. *Cruz v. Beto*, 405 U.S. at 322 n.2.

The lack of necessity for the restrictions in the case at bar is especially glaring, since the prison, without apparent difficulty, previously permitted the inmates to exercise their religion by attending the desired Friday Muslim services. The prison seems to take the position that its earlier allowance of this religious practice was the bestowal of a gratuitous privilege which the prison may terminate at will. *See* Brief for Petitioners at 12.

b. The prison seeks to restrict religion merely to further rehabilitation and administrative convenience.

It is troublesomely unclear what government interests support the restrictions at issue. The prison officials attempt to identify the prison goals in terms of security, but the restrictions appear to rest primarily on other concerns, such as rehabilitation and administrative convenience.

The prison system, for example, is experimenting, *see* Brief for Petitioners at 12 ("innovative program"), 34 ("experimental program"), 35 (same), with creation of an intermediary "gang minimum" classification for its prisoners in an effort to facilitate rehabilitation and transition of prisoners to the outside world. While these goals are laudable, and the program may prove effective, such social engineering experiments cannot suffice to justify interference with religious practice. Prisoners are captives to any number of new ideas or programs, good or bad, and to require them to forego their religious rights in the interest of such programs is to negate these rights.

The prison administration objects to the inmates' proposed accommodations on the grounds of inconvenience to or drains upon administrators and prison staff. These weak government interests, however, if permitted to prevail over religious rights, would foreclose any need for religious accommodation. Unless the prisoners' proposals are excessively demanding or unreasonable, petitioners cannot simply assert their wish to avoid the bother or expense of juggling work

schedules.[6]

c. The prison seeks to modify inmates' religious obligations to conform with administrative desires.

The prison cannot defend its regulations under the time, place, and manner analysis this Court has used to review restrictions on free speech in prison, since the application of this standard would authorize courts and prison officials to alter religious commands to suit administrative goals.

It is within neither the function nor the competence of courts or government officials to weigh the degree to which an adherent of a particular faith can tolerate religious infringements. *See Thomas,* 450 U.S. at 716. It is therefore impossible, as a threshold matter, to determine whether a regulation suppresses or merely regulates a religious practice.

The prison officials repeatedly argue that Muslims were free to hold their Friday service later in the afternoon. *See* Brief for Petitioners at 13-14, 36. Prison officials, however, have absolutely no authority to tell Muslims what is or is not religiously acceptable. Like courts, prison officials "are not arbiters of scriptural interpretation." *Thomas,* 450 U.S. at 716. The inmates here assert sincerely that their Friday service must be held just after midday; unless the courts are to assume an ecclesiastical function, that assertion must suffice.

Adoption of a time, place and manner analysis, however, would oblige courts to examine both the importance of the desired religious practice and the availability of alternative forms of practice. Consequently, the standard this Court has applied to regulations of expressive activity, which entails consideration of such alternatives, *e.g., Bell,* 441 U.S. at 551-52; *Jones,* 433 U.S. at 131; *Pell,* 417 U.S. at 823-24, 826-27, cannot apply to religious freedom questions. A court cannot hold, as the prison urges, that observance of dietary

---

[6] Indeed prison officials already make special accommodations for Muslim inmates objecting to work in the piggery. *See* Brief of Petitioners at 8. This allowance for religious practice has not yet threatened to topple the prison administration.

restrictions, access to a spiritual leader, and celebration of an annual religious feast is "enough" religious practice for Muslim inmates. *See* Brief for Petitioners at 16-17, 36-37. Prisoners seek to practice their religion as they find it; it cannot be modified or dickered away in part in order to suit the programs the prison administration wishes to implement.

II.

THE PRISON OFFICIALS MAY NOT COMPEL INMATES TO CHOOSE BETWEEN RELIGIOUS RIGHTS AND PROGRESS TOWARD FREEDOM FROM PRISON.

Finally, the restrictions in the case at bar violate the doctrine of unconstitutional conditions. Under the prisoner classification scheme which petitioners maintain, only prisoners in the "maximum" security classification can attend Friday Muslim services. If an eligible prisoner wishes to advance to a greater degree of liberty — "gang minimum" or "minimum" — he must forfeit his ability to attend the Friday service.

This Court, however, has repeatedly refused to tolerate the imposition of such a choice between rights and benefits. "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees imbedded in the Constitution may thus be manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926). *Accord Sherbert v. Verner*, 374 U.S. 398 (1963) (choice between practice of religion and receipt of unemployment benefits).

In the case at bar, the Muslim inmates can only preserve their right to practice their faith by forfeiting progress toward their return to freedom from prison. Ironically, the prison regulations, defended in the name of security, might actually encourage devout Muslims to cause trouble simply to maintain their access to the religiously obligatory Friday service.

Abandonment of religious practice, however, may not constitutionally be the price of freedom in this nation. The prison officials have impermissibly forced Muslim inmates to trade religious liberty for other freedoms.

CONCLUSION

The court of appeals properly vacated the decision of the district court, which had disallowed respondent inmates' religious claims. This Court should therefore affirm the judgment of the court of appeals.

Respectfully submitted, this 30th day of January, 1987,

STEVEN FREDERICK MCDOWELL*
General Counsel
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

WALTER M. WEBER
Associate General Counsel
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Attorneys for Amici Curiae

*Counsel of Record